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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92032341
Party	Defendant MICHEL FARAH
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**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PRAMIL S.R.L. (ESPHARMA))	
)	
Petitioner,)	Cancellation No. 92032341
)	Mark: OMIC PLUS
v.)	Reg. No. 2,447,970
)	
MICHEL FARAH)	
)	
Registrant.)	
_____)	

REGISTRANT’S MOTION FOR RELIEF FROM FINAL ORDER

Registrant, Michel Farah, (“Farah”), pursuant to Rule 60(b), Federal Rule of Civil Procedure, made applicable pursuant to 17 C.F.R. § 2.116(a), moves for relief from the final order rendered by the Board in this case upon newly discovered evidence.

The Board issued its final order in this matter on January 29, 2008, and granted Petitioner’s petitioner to cancel the registration of OMIC PLUS, Registration No. 2,447,970. The Board’s decision was appealed to the U.S. Court of Appeals for the Federal Circuit, which issued an opinion on November 24, 2008, upholding the decision of the Board.

In this proceeding, Petitioner based its claim for cancellation of the subject registration upon its claimed prior use of the unregistered mark OMIC. Upon testimony presented by the Petitioner, the Board found that Petitioner had established prior and continued use of the mark OMIC, and that there was a likelihood of confusion between the mark OMIC and Registrant’s mark OMIC PLUS. On these findings, cancellation of the registration of the mark OMIC PLUS was ordered.

On June 3, 2008, after the Board's determination in this matter and while the appeal to the Federal Circuit was pending, the U.S. Patent and Trademark Office granted registration of the mark OMIC to Registrant Michel Farah, based upon first use of the mark in 1990. A copy of Certificate of Registration No. 3,440,165 is attached to this motion.¹ Registrant submits that Certificate of Registration No. 3,440,165 is newly discovered evidence that warrants the vacating of the Board's cancellation order.

Legal Argument

Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), provides:

Certificate as prima facie evidence. A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.

Thus, the Certificate of Registration issued on June 3 of this year is prima facie evidence that Registrant Michel Farah, and not Petitioner Pramil, is the owner of the mark OMIC and has the exclusive right to use the mark OMIC in commerce. This prima facie evidence of Registrant's exclusive rights effectively destroys the very basis of Petitioner's claim for cancellation. Without the legal right to use the mark OMIC, Petitioner's asserted basis for its petition fails.

The Board has the power to consider newly discovered evidence as a basis for relief from an order. Rule 60(b)(2) provides:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

¹ Registrant intends to file a notice of reliance with a certified copy of the Registration with Title and Status, which has been ordered.

* * *

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

Because the recent Certificate of Registration was issued well after the Board's decision in this case, it did not exist and could not have been discovered prior to the Board's decision, or within ten days thereafter. *See Rowell Laboratories, Inc. v. Canada Packers Inc.*, 215 USPQ 523 (TTAB 1982) (movant must show "that what [he] seeks to introduce is newly discovered and could not have been discovered earlier through the exercise of reasonable diligence"). Further, the Circuit Court of Appeals only recently issued its opinion in the appeal from the Board's order. This motion is made well within the one-year period for making a motion under Rule 60(b)(2). *See* Rule 60(c)(1).

The newly issued Certificate of Registration has a profound effect upon the issues raised in this case. "Section 7(b) of the Lanham Act bestows upon the owner of a registration the presumption of use of a mark for all goods or services identified in a registration." *In re Reed Elsevier Properties Inc.*, 2005 TTAB LEXIS 535; 77 U.S.P.Q.2D 1649. "[T]he presumptions afforded the registrations under Section 7(b) include a presumption of use or the right to use the registered marks throughout the United States." *In re Security Benefit Life Insurance Company*, 2003 TTAB LEXIS 136. It follows that the Certificate of Registration issued for the mark OMIC precludes Petitioner's claim to be the owner of that mark and vests Registrant with exclusive rights to use the mark in commerce. In light of the registration granted to Registrant for the mark OMIC, Petitioner's use of the OMIC mark in connection with cosmetics violates Registrant's rights and constitutes infringement. Without a legal right to use the mark as it had claimed, Petitioner has no legal interest in the mark upon which its cancellation petition is based. Petitioner therefore cannot support its claim of harm from the continuation of Registrant's

registration of OMIC PLUS, and the Board's order, based upon Petitioner's discredited claim of ownership of the mark OMIC, must be vacated.

Conclusion

The issuance of Registration Certificate No. 3,440,165 by the U.S. Patent and Trademark Office is newly discovered evidence that nullifies the basis for the cancellation ordered in this proceeding. Accordingly, the order of cancellation must be vacated.

Respectfully submitted this 12th day of December, 2008.

/s/David M. Rogero/

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Attorney for Registrant Michel Farah

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Relief from Final Order was sent by first class mail with proper postage affixed, the 12th day of December, 2008, to the following counsel for petitioner:

Donald L. Dennison
Dennison, Schultz, Dougherty
1727 King Street, Suite 105
Alexandria, VA 22314

/s/David M. Rogero/

Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51 and 52

United States Patent and Trademark Office

Reg. No. 3,440,165

Registered June 3, 2008

**TRADEMARK
PRINCIPAL REGISTER**

OMIC

FARAH, MICHEL (UNITED STATES INDIVIDUAL)
ONE SOUTHEAST THIRD AVENUE, SUITE 1860
MIAMI, FL 33131

FOR: BODY CREAM; SKIN AND BODY TOPICAL LOTIONS, CREAMS AND OILS FOR COSMETIC USE; SKIN CREAM; BODY OIL; SKIN MOISTURIZER; SKIN LIGHTENERS; SKIN SOAP; SKIN TONERS; LIQUID SOAPS FOR HANDS, FACE AND BODY; BODY LOTION; SKIN LOTION; SOAPS FOR BODY CARE; HAND SOAPS, IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 11-0-1990; IN COMMERCE 11-0-1990.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 77-292,931, FILED 10-1-2007.

KIMBERLY PERRY, EXAMINING ATTORNEY